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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220718 DATE: January 28, 1986
MATTER OF: Rocky Mountain Trading Co.

DIGEST:

1. Protest filed after bid opening, which alleges that IFB requirement for automatic data processing equipment certified as compatible with software currently in use by the agency is unreasonable, is untimely and will not be considered on the merits since it is essentially an allegation of a solicitation defect apparent prior to bid opening which should have been filed prior to bid opening in accord with GAO Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985).
2. Bid is properly rejected as nonresponsive where bidder fails to acknowledge a material solicitation amendment, and absent a showing of a deliberate agency attempt to exclude the bidder from competing, bidder's alleged nonreceipt of amendment is not a viable basis for protest where adequate competition and reasonable prices were obtained.

Rocky Mountain Trading Company (RMTC) protests the rejection of its bid under invitation for bids (IFB) No. DAKF23-85-B-0167 issued by the Department of the Army, Fort Campbell, Kentucky, for automatic data processing (ADP) equipment and related software. The protester alleges that the IFB's requirement that equipment offered must be on the list of Lotus certified compatibles is unreasonable and that its bid was improperly rejected because RMTC did not acknowledge an amendment which RMTC did not, in fact, receive.

The protest is dismissed in part and denied in part.

The solicitation, issued on June 17, 1985, required microcomputers and software compatible with International Business Machines Corporation (IBM) equipment and listed as a Lotus certified compatible. On July 18, 1985, the agency issued an amendment to the solicitation to require that the

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computer monitors be monochromatic. At the time of bid opening on July 26, 1985, 6 of the 12 bids received acknowledged receipt of the amendment. The protester's bid was rejected as nonresponsive because it failed to acknowledge the amendment and because the equipment offered was not on the list of Lotus certified compatibles.

RMTC initially protested that the solicitation, as first issued, did not require Lotus certification. However, it is noted that, as referenced in the agency report, paragraph C-10 of the solicitation as originally issued states:

"a. Equipment must be on the list of Lotus certified compatibles which run 1-2-3 including graphics without modification of the 1-2-3 program and without additional drivers."

Thus, the protester's initial assertion that Lotus certification was not required in the solicitation is unfounded.

The protester also contends that the IFB requirement for Lotus certification is unreasonable because RMTC has "no ability to cause Lotus to test the Model D" and, thus, the specification essentially requires the bidder to meet a standard over which it has no control. The protester states that Lotus has failed to certify its microcomputer, the Leading Edge Model "D", as compatible because of "an error of oversight," not because it is incompatible with Lotus products.

RMTC's protest that the IFB specifications requiring Lotus certified compatibility is unreasonable constitutes an allegation of a defect in the solicitation that was apparent before bid opening. Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1985). Since RMTC's protest of this IFB specification was raised after bid opening, it is untimely and will not be considered on the merits. See Gunnison County Communication, Inc., B-219748, Sept. 19, 1985, 85-2 C.P.D. ¶ 310.

Concerning its failure to acknowledge the amendment, RMTC contends that it never received the amendment and had no knowledge of what it required until receipt of the administrative report responding to the protest.

It is well established that the bidder bears the risk of nonreceipt of a solicitation amendment. Marino Construction Co., Inc., 61 Comp. Gen. 269, 272 (1982), 82-1 C.P.D. ¶ 167 at 5. This rule is based on the principle that, from the government's point of view, the propriety of a procurement is determined on the basis of whether adequate competition and reasonable prices were obtained, not on whether a particular bidder is afforded an opportunity to bid. See Maryland Computer Services, Inc., B-216990, Feb. 12, 1985, 85-1 C.P.D. ¶ 187. Where a bidder does not receive and acknowledge a material amendment, unless it is shown that there was a conscious or deliberate effort on the part of the agency to exclude the bidder from competing for the contract, generally such a bid must be rejected as nonresponsive. Otherwise, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. See Gibraltar Industries, Inc., B-218537.3, July 3, 1985, 85-2 C.P.D. ¶ 24 at 3; see also General Atronics Corp., B-217305, Jan. 4, 1985, 85-1 C.P.D. ¶ 20.

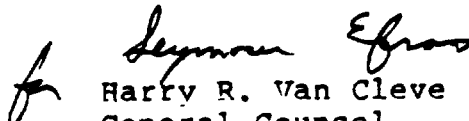
An amendment is material if it affects the bidder's price or the quantity, quality or delivery terms of the IFB in more than a trivial or negligible manner. 48 C.F.R. § 14.405 (1984); see Doyon Construction Co., Inc., 63 Comp. Gen. 214 (1984), 84-1 C.P.D. ¶ 194. An amendment is also considered material if it changes the legal relationship between the parties. Gibraltar Industries, Inc., B-218537.3, supra, 85-2 C.P.D. ¶ 24 at 4.

In this case, the amendment clarified the specifications concerning the monitor and indicated that only monochromatic monitors would meet the agency's needs. Accordingly, the amendment did affect the price and quality of the product offered, because, absent this requirement, the bidder would not be legally obligated by the solicitation to provide monochrome monitors. We conclude, therefore, that the amendment was material and that the failure to acknowledge the amendment could not properly be waived. 48 C.F.R. § 14.405. Also, in view of the agency's receipt of six bids that acknowledged the amendment, it appears that adequate competition and reasonable prices were obtained. Moreover, the protester does not allege that the agency acted consciously or deliberately to exclude it from competing, and the agency's records show that RMTC was mailed a copy of the amendment. Under these circumstances we find that RMTC's bid was properly rejected. Triple A. Shipyards, B-218079, Feb. 6, 1985, 85-1 C.P.D. ¶ 149. Accordingly, the protest is denied on this issue.

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The protest is dismissed in part and denied in part.


Harry R. Van Cleve
General Counsel